92-1920

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

KAREN LIVADAS,
PETITIONER

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER FOR THE
STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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73 pp

QUESTION PRESENTED

May a state agency refuse to enforce state wage-and-hour law for union workers because they exercise their federally-protected right to bargain collectively, under *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986)?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the courts below are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Karen Livadas prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the District Court is reported at 749 F.Supp. 1526 (N.D. Cal. 1990), and is set forth at pages 22a to 50a of the appendix (App. 22a-50a). The decision of the Court of Appeals is reported at 943 F.2d 1140 (9th Cir. 1991). On March 8, 1993, the Court of Appeals filed an order adding a footnote to its earlier opinion and denying Livadas' petition for rehearing. App. 51a-53a. The Court of Appeals' final amended opinion is reprinted at App. 1a-21a.

JURISDICTION

The Court of Appeals filed its amended opinion, along with an order denying Livadas's timely petition for rehearing, on March 8, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in relevant part:

> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Cal.Lab.Code § 201 provides in relevant part:

> If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.

Cal.Lab.Code § 203 provides in relevant part:

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days.

Cal.Lab.Code § 229 provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

STATEMENT OF THE CASE

A. Facts

The California Labor Commissioner, head of the Division of Labor Standards Enforcement (DLSE), is charged with enforcing the state Labor Code on behalf of employees who "are financially unable to employ counsel and . . . have claims which are valid and enforceable." Cal.Lab.Code § 98.3(a). The California Labor Code imposes a number of wage-and-hour regulations on employers in the state; for example, the Labor Code requires employers to give employees their final paycheck immediately on termination, with daily penalties for any delay. Cal.Lab.Code §§ 201 and 203. The policy of the DLSE is to enforce these regulations for all employees except those covered by a collective bargaining agreement with grievance arbitration. App. 25a.

Petitioner Karen Livadas is a grocery clerk. She is a member of Local 373, United Food and Commercial Workers, AFL-CIO.

In January 1990, Livadas tried unsuccessfully to lodge a complaint with the DLSE against her employer for violation of the state Labor Code. Safeway Stores had refused to give Livadas her final paycheck immediately upon termination,

telling her that she would have to wait to receive her final wages by mail. During the following week, Livadas applied to the local office of the DLSE three times to enforce Cal.Lab.Code §§ 201 and 203 against Safeway for its three-day delay in her final wage payment. On January 3 and 8, 1990, DLSE officers told her that the agency could not process her charge, and that she must resolve her complaint through her union or the National Labor Relations Board. App. 24a. On January 9, 1990, Livadas was finally permitted to complete a one-page DLSE "Initial Report." This standardized intake form asks applicants, among other questions, "Was your job union?" Livadas checked the box "Yes."

The Division's only response to Livadas's complaint was a form letter dated February 7, 1990. This letter reiterated that the DLSE does not enforce Labor Code §§ 201 and 203 for employees whose employment is covered by a collective bargaining agreement and grievance arbitration. Because Livadas's job with Safeway Stores was covered by such a union contract, the Division's letter informed her that the agency was closing its file on her complaint. App. 3a. No hearing was ever held on Livadas's Labor Code charge. Safeway Stores was never required to appear or plead defenses to Livadas's complaint.

B. Proceedings Below

Livadas brought this action against the Labor Commissioner under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the DLSE's policy of excluding workers with union contracts from the enforcement of the state Labor Code. Livadas contends that the Commissioner's policy impermissibly penalizes union workers in California for exercising their federal right to organize and bargain collectively, a right protected from state interference by § 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, under *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) and 493 U.S. 103 (1989) (*Golden State I* and *II*).

The Commissioner argues that his agency excludes workers with union contracts[1] under the compulsion of a 1975 state court injunction, *Plumbing, Heating and Piping Employers Council v. Howard*, 53 Cal.App.3d 828 (1975). The Commissioner justifies this policy disqualifying union workers by citing Cal.Lab.Code § 229, which prohibits the Commissioner from intervening in "any dispute concerning the interpretation or application of any collective bargaining agreement containing . . . an arbitration agreement." On this basis, Livadas and the Commissioner submitted the case on cross-motions for summary judgment.

The District Court (Henderson, J.) granted Livadas's motion for summary judgment. The District Court held that Cal.Lab.Code §§ 201 and 203 are minimum standards of employment that do not require interpretation of a worker's union contract and are therefore not preempted by § 301 of the LMRA, following *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-58 (1985), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19-22 (1987) and *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 403-11 (1988). App. 40a-48a. The District Court held that the Commissioner's policy of refusing to enforce these wage-and-hour regulations for union workers imposes an impermissible penalty on their NLRA-protected activity. Following *Golden State I*, the District Court issued a state-wide injunction ordering the Commissioner "to enforce sections 201 and 203 of the California Labor Code without discrimination based upon a given claimant's coverage under a collective-bargaining agreement having an arbitration clause." App. 27a-39a, 49a.

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[1] Strictly speaking, the injunction in *Howard* prohibits enforcement for workers covered by collective bargaining agreements "with an arbitration clause." This is not a meaningful distinction, because virtually all union contracts provide for grievance arbitration. *See Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 411 n.11 (1988). Under federal law, grievance arbitration is "part and parcel of the collective bargaining process itself." *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574, 578 (1960).

After an expedited appeal, a divided Ninth Circuit panel reversed. The panel majority (Rymer, J.; Alarcon, J. concurring) declined to decide whether Cal.Lab.Code §§ 201 and 203 are actually preempted by federal labor law. Instead, the Ninth Circuit emphasized that the Commissioner's exclusion policy is based on Cal.Lab.Code § 229, a "perfectly valid" state labor preemption statute. The panel majority reasoned that even if the Commissioner's application of this state statute is wrong, his resulting "erroneous eligibility determination" is, at most, an error of state law for which federal law provides no remedy. App. 12a. The Ninth Circuit acknowledged that, "by virtue of the fact that Livadas is covered by a collective bargaining agreement, she may be more likely to get an erroneous eligibility determination" than non-union workers, but the Court of Appeals reasoned that this result is simply "a function of the complexity of preemption law and the inherent tension between federal and state systems for adjudicating labor disputes." App. 12a-13a. The panel majority concluded: "[W]e believe that Congress would not want state officials erring on the side of adjudicating labor disputes whenever it is a close call as to whether a claim is preempted. If anything, Congress would presumably want state officials to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a [union contract]." App. 14a.

In dissent, Judge Kozinski protested that anti-union discrimination violates federal rights, whatever the Commissioner's motives. Despite the Commissioner's belief that he is complying with state labor preemption law, the fact remains that "the only employees excluded as a class are those who exercise their federal labor rights." App. 20a. According to Judge Kozinski, "[w]e can't duck the question whether such federal law renders such discrimination impermissible." App. 17a.

Judge Kozinski accused the majority of obscuring this discrimination by "seek[ing] refuge in a novel doctrine of quasi-preemption," under which state officials should refuse

enforcement to union workers "by virtue of certain penumbras and emanations radiating from the body of federal labor law." App. 17a. Judge Kozinski insisted that it is inappropriate for courts "to guess at what Congress 'presumably' would have wanted," and he warned that the majority's divination of "some preemptive corona surrounding the federal labor laws" would nullify this Court's efforts to clarify what is *not* preempted. App. 18a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision conflicts with decisions of this Court and several other circuits, and raises an important question of federal law that this Court should resolve, in two areas. First, the decision hinders *Machinists* preemption, by allowing local governments to escape a federal remedy just by invoking local labor preemption laws. This new limitation on federal law directly conflicts with decisions of the Fourth and Eighth Circuits. Second, the decision badly damages the uniformity of § 301 preemption doctrine. The Ninth Circuit's new penumbral rule will nullify this Court's recent efforts to resolve this problem, and it conflicts with the First Circuit's treatment of a similar wage-and-hour statute.

1. The Ninth Circuit's decision critically weakens the federal power known as "*Machinists* preemption" under § 7 of the NLRA.[2] According to the Ninth Circuit, union workers have no federal remedy under *Machinists* and *Golden State*, because the Commissioner bases his exclusion policy on Cal.Lab.Code § 229, a "perfectly valid state statute" that duplicates federal law. App. 12a. If the Commissioner's application of this state statute is mistaken, the Ninth Circuit

[2] This doctrine takes its name from *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), which held that a state agency could not penalize union activity that Congress intended to be unregulated by the States. In *Golden State I*, this Court extended *Machinists* to rule that a local government may not withhold a benefit under local law because of an applicant's exercise of NLRA rights, 475 U.S. at 619-20; *Golden State II* held that these rights are fully enforceable against government penalty under § 1983. 493 U.S. at 108-13.

reasons, the resulting exclusion of union workers is not a matter of federal concern. App. 12a-13a. As Judge Kozinski bluntly put it, this deferral to a parallel state labor preemption law is "gutting" the protections of *Machinists* and *Golden State* in the Ninth Circuit. App. 21a.

The harm is not just that individual union members like Livadas will go without certain state-law entitlements. The principal effect is that this differential treatment will tend to discourage workers from collective bargaining in the first place. As Judge Kozinski explains, an employer in California may now truthfully warn its employees during a union organizing campaign: "'Look here, if you vote for the union, the first thing that happens to you is that the state Labor Commissioner abandons you.'" App. 21a n.2.

Although Livadas's union may bargain to replace the lost statutory benefits, her employer is under no obligation to agree.[3] Unionized employees in California may have to go on strike to win back the same minimum guarantees that non-union workers in the state enjoy as a matter of statutory right. For lower-wage workers, collective bargaining may not be worth the risk if that choice will cost them the protections of California law.

This is exactly the kind of state-law penalty on the exercise of § 7 rights for which *Machinists* and *Golden State* intend a federal remedy. The Ninth Circuit's refusal to enforce that federal remedy in deference to a state labor preemption law directly conflicts with decisions of the Fourth and Eighth Circuits. In *Rum Creek Coal Sales v. Caperton*, 971 F.2d 1148, 1152-54 (4th Cir. 1992), the Fourth Circuit rejected an identical attempt to escape a *Golden State* injunction. During a strike at a coal mine, the West Virginia State Police officially declined to arrest picketers trespassing on mine property on the basis of the state's "Neutrality Statute," W. Va. Code § 15-2-13, which forbids state officers to "aid or assist either

[3] As the District Court noted, Livadas's union contract with Safeway Stores does not provide for immediate wage payment on termination or for penalties for late payment. App. 42a.

party . . . in any labor trouble or dispute between employer and employee . . . ." 971 F.2d at 1150-52. The mine owner won a *Golden State* injunction ordering the State Police to enforce its state-law property rights without discrimination. The Fourth Circuit acknowledged that the state Neutrality Statute was facially valid, 971 F.2d at 1154, but held that the state agency's inaction because of its flawed interpretation of that statute interfered with the mine owner's federal right to withstand a strike. *Id.*

The *en banc* Eighth Circuit made the same choice in *Steelworkers v. Johnson*, 830 F.2d 924, 926-29 (8th Cir. 1987) *(en banc)*. A mine closed down during a labor dispute; the South Dakota Department of Labor disqualified all union members from unemployment benefits, but granted benefits to their non-union co-workers on the theory that the latter were involuntarily unemployed, while the former were deemed voluntarily on strike. In federal court, the state agency argued that it was only applying a valid eligibility condition (i.e., that claimants must be involuntarily unemployed) to the facts of particular claimants. The full Eighth Circuit agreed that the state law was "neutral on its face," but ruled that the state agency's "skewed application of its facially neutral test . . . significantly burdens the section 7 right to participate in organized labor." 830 F.2d at 928-29. The *en banc* Eighth Circuit enjoined South Dakota from construing its facially valid eligibility standard to disqualify employees on the basis of their union activity. *Id.*

The Ninth Circuit's decision cannot be reconciled with *Rum Creek Coal Sales* and *Johnson*. If the Ninth Circuit is right, the plaintiffs in those cases had no federal remedy for the "misinterpretation of a perfectly valid state statute." *cf.* App. 12a. The vitality of *Machinists* preemption depends on how this conflict is resolved. If the Ninth Circuit's deferral rule survives, local governments with an interest in organized labor (whether friendly or hostile) will inevitably begin enacting parallel state labor preemption statutes to insulate themselves from a federal remedy.

For example, the City of Los Angeles could enact an ordinance forbidding municipal franchises to be awarded in a way that would "interfere with the balance of power in a labor dispute." So long as the City professed to be interpreting this labor neutrality law on the facts of each employer's application, the City could deny a taxicab franchise to any future employer withstanding a strike. Under these circumstances, the federal courts in the Ninth Circuit would not have the authority to correct the City's mistaken application of its "perfectly valid" local law.

This result cancels *Golden State*. Labor-management conflict will always generate political pressure on local governments to intervene; this is why federal control under *Machinists* and *Golden State* is so necessary for a uniform federal labor policy.

The Ninth Circuit disserves this purpose by introducing a new abstention rule to the law of § 1983. The Ninth Circuit reasons that, if the Commissioner's policy is invalid, a union worker's proper remedy is to seek a traditional writ of mandamus in the California courts. App. 12a. This is a strange exhaustion requirement, considering that Livadas has no right of appeal in the California courts from the Commissioner's refusal to prosecute a Labor Code charge. *See Painting & Drywall Work Preservation Fund v. Aubry*, 206 Cal.App.3d 682, 684-87 (1988). The Commissioner cannot label his exclusion of Livadas as some type of unappealable adjudication of rights: Livadas was automatically disqualified, and her employer never had to appear or plead defenses in any adversary proceeding.

Taken to its logical conclusion, the Ninth Circuit's abstention in favor of the state courts' mandamus power would abolish the § 1983 injunction altogether, because the catch-all remedy of traditional mandamus is always available to compel a state actor to obey any law, state or federal. For instance, the taxicab company in *Golden State* could easily have petitioned for mandamus in the California courts to review the

City's denial of its municipal license.[4] Since *Patsy v. Board of Regents*, 457 U.S. 496 (1982), however, § 1983 plaintiffs have not been required to exhaust their state-law remedies, because § 1983 was enacted to guarantee a federal forum for the protection of federal rights.

The Ninth Circuit's deferral rule allows local governments who find *Machinists* preemption inconvenient to avoid a federal injunction just by adjusting their litigation tactics. This Court should grant certiorari to ensure that federal labor law is not circumvented this easily.

2. The Ninth Circuit's decision will also splinter the uniformity of preemption law under § 301 of the LMRA. The damage in this case is not that a court has mistakenly ruled that two minor California regulations are in fact preempted. The damage is that the Ninth Circuit refuses to answer this question of federal law at all, and devises instead a rule of thumb for state agencies to resolve all doubts about the meaning of the law against union workers. The Ninth Circuit suggests that federal labor preemption is inherently ambiguous, App. 13a, and so authorizes state officials to refuse enforcement to union workers "whenever it is a close call as to whether a claim would be preempted," or whenever "a claim even arguably is intertwined with consideration" of a union contract. App. at 14a.

As Judge Kozinski warns, this "novel doctrine of quasi-preemption" will nullify this Court's efforts to clarify what is *not* preempted. App. 17a-18a. Since 1985, this Court has repeatedly answered these doubts by holding that workers covered by union contracts are fully entitled to the benefits of minimum state labor standards, in *Metropolitan Life*, *Fort Halifax Packing*, and *Lingle*.

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[4] The California courts have the power of administrative mandamus over local governments' decisions on applications for municipal franchises and licenses. *See Sierra Club v. City of Hayward*, 28 Cal.3d 840, 848-49 (1981).

Despite this authority, the lower courts have continued to struggle with the idea that union workers have state-law employment rights. An earlier Ninth Circuit panel frankly described § 301 preemption after *Lingle* as a "thicket," a "tangled and confused interplay between federal and state law," and "one of the most confused areas of federal court litigation."[5] The Supreme Court of Washington recently lamented that "courts are still struggling to ascertain when a claim's resolution actually *will* involve interpretation or consideration of the [collective bargaining agreement], and section 301 cases are still far from uniform or consistent, varying widely in their holdings, even after *Lingle*."[6]

The Ninth Circuit's new preemption rule will make the prevailing uncertainty over § 301 preemption much worse, because this is the first federal appellate decision to endorse that uncertainty as an integral element of preemption law. Reasonable minds have always differed over the "arguable" nuances of the law affecting collective bargaining—this is exactly why a unified federal labor doctrine is so necessary. *See Teamsters v. Lucas Flour*, 369 U.S. 95, 103-04 (1962). If pro-union and anti-union state agencies apply different preemption rules to collective bargaining, "the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to [union contracts]" in the first place. *Id.* at 104.

The Ninth Circuit's penumbral preemption standard is especially damaging because it is applied here to a wage-and-hour regulation that is clearly not preempted. As the District Court and Judge Kozinski point out, the question of whether Livadas's employer violated Cal.Lab.Code § 201 can be determined simply by looking at a calendar, not at the union contract. App. at 19a-20a; 41a. The Commissioner's objection

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[5] *Galvez v. Kuhn*, 933 F.2d 773, 774, 776 (9th Cir. 1991), quoting Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 209 (1989).

[6] *Commodore v. University Mechanical Contractors*, 120 Wash.2d 120, 129, 839 P.2d 314, 318 (1992) (emphasis in original).

that he will have to calculate Livadas's § 203 penalties from the wage rate in her union contract is answered by *Lingle*, 486 U.S. at 413 n.12. The First Circuit holds that a similar Maine wage-and-hour statute prohibiting wage deductions from payroll checks is not preempted by § 301 of the LMRA. *Beckwith v. United Parcel Service*, 889 F.2d 344, 346-49 (1st Cir. 1989). If, contrary to the First Circuit, state wage-and-hour laws like these present such a "close call" that state officials should disqualify union workers, it is hard to see how any preemption question could ever be clear enough to satisfy state officials' doubts.

The Ninth Circuit promotes this kind of doctrinal mischief when it declares that state officials will be protecting the grievance-arbitration process by resolving doubts against union workers. Unfortunately for a union worker like Livadas, this "benefit of the doubt" preemption rule would vanish the moment she tried to enforce the state Labor Code through a contract grievance. Labor arbitrators may only enforce rights arising under the union contract, not under external law. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974). In the event that an arbitrator did try to award a remedy for Livadas's complaint under Cal.Lab.Code §§ 201 and 203, the award would be swiftly vacated in federal court as outside the arbitrator's authority. *See Steelworkers v. Enterprise Wheel & Car*, 363 U.S. 593, 597 (1960). By disqualifying union workers from Labor Code enforcement, the Commissioner is not protecting the arbitration of contractual grievances; he is penalizing workers for negotiating union contracts in the first place.

This Court will have to revisit this question soon to preserve the uniformity of § 301 preemption law. Unfortunately, the preemption controversy usually arises from state-court judicial proceedings, where the issue is limited to a single plaintiff's claim under a specific state law. By contrast, this

lawsuit has attracted unusual attention from legal scholars,[7] multi-employer associations,[8] and the courts below, because it attacks a state-wide bureaucratic policy of excluding union workers without any individual adversary proceedings. The Ninth Circuit's reversal of the District Court's state-wide injunction affected the rights of all union members in California, and established a penumbral preemption rule that now governs all state employment laws in the Circuit. This is an unusually significant case, one that this Court should decide to clear up the lower courts' uncertainty.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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[7] Two academic commentators have already strongly criticized the Ninth Circuit's decision in this case and applauded Judge Kozinski's dissent. See Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575, 618-20 (1992); Note, *The Golden State of Labor Preemption: The Circuit Courts Have Gone Too Far*, 44 Hastings L. J. 131, 156-58 (1992).

[8] Two state-wide employers' associations filed extensive *amicus curiae* briefs in support of the Commissioner in the Court of Appeals: the Food Employers Council, and the employer trustees of the Carpenter Employers Contract Administration Trust Fund.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-16650
D.C. No. CV-90-0468-TEH

KAREN LIVADAS,
PLAINTIFF-APPELLEE

v.

LLOYD AUBRY,
IN HIS OFFICIAL CAPACITY AS LABOR COMMISSIONER
FOR THE STATE OF CALIFORNIA
DEFENDANT-APPELLANT

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THELTON E. HENDERSON, District Judge, Presiding

Argued and Submitted
May 13, 1991—San Francisco, California

Filed September 11, 1991
Amended March 8, 1993

Before: Arthur L. Alarcon, Alex Kozinski and
Pamela Ann Rymer, Circuit Judges

Opinion by Judge Rymer;
Dissent by Judge Kozinski

OPINION

RYMER, Circuit Judge:

Karen Livadas brought this action under 42 U.S.C. § 1983 against Lloyd Aubry, the Labor Commissioner of California (Commissioner). She argues that the Commissioner deprived her of her right under the National Labor Relations Act (NLRA) to bargain collectively because he denied her enforcement of certain sections of the California Labor Code based on his determination that adjudicating her dispute would concern the interpretation or application of a collective bargaining agreement containing an arbitration clause. The district court granted Livadas's motion for summary judgment. We reverse.

I

Livadas was terminated from her job at Safeway on January 2, 1990. On that day, she requested all pay due her. The store manager refused, saying that he did not have payroll records at the store and that he would instead mail her a check. Livadas received the check on January 5, 1990.

Livadas does not dispute the amount of the check, but she contends that Safeway's three-day delay in payment violated California law. California Labor Code § 201 provides: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Section 203 provides: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Section[ ]201 . . ., any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid." Based on these statutes, Livadas claims that Safeway owes her penalty payments for the three days her check was delayed.

On January 9, 1990, Livadas filed a claim for the penalties with the California Division of Labor Standards Enforcement

(DLSE). The Commissioner heads the DLSE. He may prosecute actions to collect penalties for persons who, in his judgment, "are financially unable to employ counsel and . . . have claims which are valid and enforceable." Cal. Lab. Code § 98.3(a).

In a letter dated February 7, 1990, the DLSE informed Livadas that it could not proceed with her claim because California Labor Code § 229 precludes the DLSE from adjudicating "any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause." The letter explained that it was the DLSE's understanding that Livadas was covered by a collective bargaining agreement containing an arbitration clause. Because § 203 requires that wages continue at the "same rate," and the collective bargaining agreement established Livadas's rate of pay, the DLSE concluded that prosecuting Livadas's claim would require applying the collective bargaining agreement.

On February 16, 1990, Livadas filed a complaint in the district court under 42 U.S.C. § 1983 against Lloyd Aubry in his official capacity as Labor Commissioner, seeking injunctive and declaratory relief and damages based on his refusal to prosecute her claim. She alleged that the Commissioner's policy of not enforcing § 203 claims for employees who worked under collective bargaining agreements denied her the benefit of his enforcement powers on the sole basis that she was a union member covered by a collective bargaining agreement. Such a policy, she contended, interfered with her right under the NLRA to bargain collectively.

Both parties moved for summary judgment. The district judge initially denied both motions, concluding that there were genuine issues of material fact. Livadas made a motion for reconsideration, which the district court granted. Upon reconsideration, the district court granted Livadas's motion for summary judgment, concluding that § 1983 provided

Livadas with a cause of action and that the Commissioner's policy deprived Livadas of her right to bargain collectively. The Commissioner appeals.

II

The threshold issue in this case is whether Livadas has asserted the sort of violation that is actionable under § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court has interpreted § 1983 to provide a cause of action for a deprivation of rights granted by the NLRA. In *Golden State Transit Corp. v. City of Los Angeles, (Golden State II)*, 493 U.S. 103, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989), the Court held that an employer could bring an action under § 1983 based on a city's interference with the collective bargaining process. In that case, the city had conditioned renewal of the employer's taxicab franchise on its settling a strike. The Court had held in an earlier appeal that the city's action interfered with and was therefore preempted by the NLRA because an employer's withstanding a strike is conduct that Congress intended to be left unregulated either by it or by the states. *Golden State Transit Corp. v. City of Los Angeles, (Golden State I)*, 475 U.S. 608, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986).

In *Golden State II*, the Court applied a two-part test to determine whether the city's violation was actionable under § 1983:

> First, the plaintiff must assert the violation of a federal right. . . . In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." . . . We have also asked whether the provision in question was "inten[ded] to benefit" the putative plaintiff.
>
> Second, even when a plaintiff has asserted a federal right, the defendant may show that Congress "specifically foreclosed a remedy under § 1983," by providing a "comprehensive enforcement mechanis[m] for protection of a federal right."

107 L. Ed. 2d at 427-28 (citations omitted).

The Court concluded that the second prong was satisfied because, while Congress has created a comprehensive scheme to prevent unfair labor practices by employers and unions (through the creation of the NLRB), it has not provided any mechanism to address governmental interference with rights protected by the NLRA. *Id.* at 429. The Court went on to conclude that the first prong was also satisfied because the NLRA implicitly protects an employer's right to use permissible economic weapons free from governmental interference. *Id.* at 430-32.

Golden State II's resolution of the second prong applies with equal force in this case. The NLRB has no power to address the Commissioner's alleged interference with Livadas's NLRA rights. Thus, a § 1983 suit is not precluded on this ground.

The parties' dispute on this issue centers on whether Livadas has asserted a "right" that is protected by the NLRA against governmental interference. Livadas contends that the NLRA grants her a right, as an employee, to bargain collectively.

The plain language of the NLRA supports Livadas's position. Section 7, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . .

Similarly, the NLRA declares it to be the policy of the United States to

> eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

The Supreme Court in *Golden State II* also seemed to assume that the NLRA establishes a right to bargain collectively. It reasoned that "[t]he rights protected against state interference . . . are not *limited* to those explicitly set forth in § 7 as protected against private interference." 107 L. Ed. 2d at 430 (emphasis added). It concluded that the employer was "the intended beneficiary of a statutory scheme that prevents governmental interference with the *collective-bargaining process*." *Id.* (emphasis added). The right in *Golden State* to be free from interference in the collective bargaining process would be meaningless if parties had no right to engage in collective bargaining in the first place.

The Commissioner acknowledges this right to bargain collectively, but he contends that the right to bargain belongs only to the union, not to an individual employee. But the NLRA speaks in terms of the rights of employees, not unions. The Commissioner's interpretation that it only gives unions the right to bargain collectively does not comport with § 7's language that *employees* have the right "to bargain collectively *through* representatives." 29 U.S.C. § 157 (emphasis added).

Moreover, the Supreme Court has interpreted § 7 to apply to acts by individual employees, not just to acts by unions. In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984), the Court held that an employee's assertion of a right under his CBA was "concerted activity" for purposes of § 7, such that his discharge based on it constituted an unfair labor practice. In reaching its conclusion, the Court explained that an individual's acts in joining and assisting a labor organization are protected under § 7, noting that "Congress viewed each employee as engaged in concerted activity." *Id.* at 833.

The Commissioner cites *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 95 S. Ct. 977, 43 L. Ed. 2d 12 (1975), in support of his position that Livadas has no individual right to bargain collectively. There, a group of minority employees contended that they had a right, under § 7, to bargain with their employer without the assistance of their union. The Court held that they did not because § 7 only protects the right to bargain through elected representatives, that is, to bargain collectively, and it does not protect the right to bargain separately.

Emporium Capwell has no application here. Livadas does not assert that she has a right to bargain independently of her union. Indeed, the whole dispute arose in this case because she was covered by a *collective* bargaining agreement. The right she asserts is simply to be allowed to participate in her union's collective bargaining activity.

We conclude that Livadas has a cause of action under § 1983. Federal law gives her a right to engage in collective bargaining, and § 1983 therefore provides a remedy for a deprivation of that right.

III

Turning to the merits, we must decide whether the Commissioner has in fact deprived Livadas of her right under the NLRA to bargain collectively. The Commissioner's policy is

not to adjudicate any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause. Livadas does not object to this policy because she concedes that the Commissioner's enforcement under those circumstances would be preempted by federal labor law. Rather, she claims that the Commissioner applied the policy incorrectly in this case because, she contends, California Labor Code §§ 201 and 203 provide independent state rights and do not concern the interpretation or application of collective bargaining agreements. For that reason, she asserts that her claim in fact would not be preempted by federal labor law. She argues that by misapplying the policy in her case and going beyond federal preemption principles, the Commissioner has deprived her of her right to bargain collectively.

A. *The Commissioner's policy*

The Commissioner explained fully his reason for denying Livadas enforcement of her claim in the DLSE's letter of February 7, 1990:

> It is our understanding that the employees working for Safeway are covered by a collective bargaining agreement which contains an arbitration clause. The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause.
>
> Labor Code Section 203 requires that the wages continue at the "same rate" until paid. In order to establish what the "same rate" was, it is necessary to look to the collective bargaining agreement and "apply" that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit.

The Commissioner thus made clear that his policy is not to enforce any claim that concerns the interpretation or application of any collective bargaining agreement containing an arbitration clause, pursuant to California Labor Code § 229. He

then interpreted § 229 to preclude enforcement in Livadas's case because deciding her § 203 claim would require applying her collective bargaining agreement, which contains an arbitration clause.

The Commissioner's statement of his policy is entirely consistent with the provisions of Labor Code § 229, which states:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

The California courts have interpreted § 229 as "prohibit[ing] the Labor Commissioner from assuming jurisdiction to enforce claims for wages arising under collective bargaining agreements." *Plumbing, Heating & Piping Employers Council v. Howard*, 53 Cal. App. 3d 828, 834-35, 126 Cal. Rptr. 406, 410 (1975).

The Commissioner points out that § 229 is intended to reflect principles of federal preemption in the area of labor relations. The court in *Howard* explained that the aim of § 229 is to "recognize the importance of both collective bargaining agreements and arbitration," *id.* at 833, and to maintain the primacy of federal labor law. *Id.* at 833-35; *see also Bechtel Constr., Inc. v. United Brotherhood of Carpenters*, 812 F.2d 1220, 1223 (9th Cir. 1987). Similar to California's rule, the Supreme Court has held that state law claims are preempted if they are "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985). We therefore understand § 229 to preclude the adjudication of claims that would be preempted by federal labor law.

The Commissioner's policy of not enforcing claims that concern the interpretation or application of collective bargaining agreements containing arbitration clauses is thus based on the idea that such enforcement would be preempted by federal law.

B. *Deprivation of Livadas's NLRA right*

We do not believe that the Commissioner's denial of enforcement on the basis that Livadas's claim would concern the interpretation or application of a collective bargaining agreement deprived Livadas of her right to bargain collectively; indeed, we do not believe it implicated her federal rights at all. Livadas does not object to the rule stated in § 229 and *Howard* because she recognizes that it reflects principles of federal preemption. She further recognizes that she could not have a right to the Commissioner's enforcement if that enforcement were preempted because, of course, she does not have the right to compel the Commissioner to do that which federal law does not permit him to do. Livadas's objection is rather that the Commissioner misinterpreted the rule because she claims that in fact her § 203 claim would not be preempted by federal labor law. We need not reach the question of whether the Commissioner incorrectly determined that her § 203 claim was preempted because, even if he did, Livadas has not established a deprivation of her right to bargain collectively.

Livadas relies on *Golden State I* and *II* to support her argument that the Commissioner may not condition his enforcement on her not having worked under a collective bargaining agreement. *Golden State* makes clear that the denial of a benefit in some cases can be sufficient to constitute an infringement. There, the city had conditioned a franchise renewal on the employer's settlement of a strike. Even though the franchise renewal was a privilege, not a right, the Court held that conditioning its conferral on relinquishment of the employer's federally protected right to withstand the strike impermissibly infringed that right. *See also Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 511 (9th Cir. 1988), ("government

may not condition the conferral of a benefit on the relinquishment of a constitutional right"). Thus, Livadas correctly states the law when she states that conditioning a benefit on the relinquishment of a federal right can infringe that right.

But Livadas's general statement of the law does not dispose of this case. There is a fundamental difference between this case and *Golden State*. In *Golden State*, the city's condition itself was impermissible. The city demanded that the taxicab company settle its strike as a condition for renewing its franchise. The city's condition on the conferral of its benefit was that the employer not exercise its federally protected right to withstand a strike.

Here, the Commissioner's condition is *not* that Livadas not exercise her right to bargain collectively. It is that enforcement not require the interpretation or application of a collective bargaining agreement. That condition is perfectly permissible under federal law. In fact, it is required under federal law, for if adjudicating the dispute would require interpreting a collective bargaining agreement, federal law would preempt the adjudication. Livadas does not contest this point, and she therefore does not challenge the condition itself.

Rather, she challenges the application of the rule to her case. She claims that the Commissioner erred in deciding that her claim was preempted. This argument would be equivalent to the employer in *Golden State* arguing that the city deprived it of its federal rights because the employer had in fact settled the strike. That argument clearly would have failed because the determination of whether or not the employer had complied with the city's condition is simply a question of interpreting the city's condition and does not implicate federal rights.

Similarly here, because Livadas does not challenge the condition the Commissioner places on his enforcement but only his interpretation that the condition has not been satisfied, she has not demonstrated any deprivation of her federal

rights. Simply because the Commissioner (arguably) erroneously determined that her claim would be preempted does not invalidate the condition he placed on his enforcement. It does not change the fact that he has conditioned his enforcement on his determining that the claim would not be preempted by federal labor law. And it does not change the fact that his condition is perfectly permissible, indeed required, under federal law.

Livadas is left, then, with the simple claim that the Commissioner erroneously interpreted his own policy. That amounts only to a state law claim that she is in fact eligible for the Commissioner's enforcement under California Labor Code § 229. The appropriate relief would be a writ of mandate from the California courts, see *Baker v. Aubry*, 216 Cal. App. 3d 1259, 265 Cal. Rptr. 381 (1989), *review denied*, Mar. 15, 1990, *cert. denied*, 111 S. Ct. 66 (1990), and she could seek such relief on the ground that the Commissioner misinterpreted § 229. A misinterpretation of a perfectly valid state statute, however, does not provide grounds for federal relief.

To hold that Livadas is entitled to federal relief in this case would require us to hold that she is entitled under the NLRA to a correct interpretation of California law regarding enforcement of § 203 claims. We cannot so hold. Livadas is in the same position as every other employee in the state when it comes to seeking the Commissioner's enforcement. Every employee who seeks enforcement is subject to an eligibility determination, and every employee who seeks enforcement is subject to the risk that the Commissioner will get it wrong. If the Commissioner gets it wrong, the employee (whether or not she worked under a collective bargaining agreement) can seek a writ of mandate to correct the error. Thus, we do not see how the Commissioner, simply by making an erroneous eligibility determination, has penalized Livadas for the exercise of her right to bargain collectively because he has treated her exactly the same as every other employee in the state.

Of course, by virtue of the fact that Livadas is covered by a collective bargaining agreement, she may be more likely to

get an erroneous eligibility determination than employees who do not work under collective bargaining agreements because the Commissioner is more likely to hold that her claim is preempted by federal labor law.[1] But that is a function of the condition placed on enforcement that the claim not be preempted—a condition to which she does not object and could not object. It is also perhaps a function of the complexity of preemption law and of the inherent tension between federal and state systems for adjudicating labor disputes. It is *not* a function of the Commissioner's placing any kind of impermissible condition on the benefit of his enforcement.

We cannot believe that Congress intended in granting a right to bargain collectively to give employees who choose to do so the right to have a state official correctly interpret the state's own law. That would place employees who bargain collectively in a better position than those who do not because it gives them an extra avenue of redress for the erroneous determination of state law. Because § 7 of the NLRA gives employees the right to *refrain* from bargaining collectively as well as the right to do so, 29 U.S.C. § 157, we do not believe that Congress could have intended to confer extra rights on employees who choose to bargain collectively. At least without an express direction from Congress that it so intended, we will not read the right to bargain collectively to include such an extraordinary right.

Finally, we are also persuaded by the more general policies of federal labor law that Congress did not intend to protect workers from an erroneous determination that their state law claims are preempted by federal labor law. Congress intended to create a uniform body of federal law for labor disputes arising under collective bargaining agreements. To that end, it created a comprehensive scheme for adjudicating such disputes. *See generally* 29 U.S.C. § 185 (Labor Management

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[1] Presumably, the only way an employee who does not work under a collective bargaining agreement could get this same determination is if the Comissioner makes an erroneous *factual* determination that the employee did work under a collective bargaining agreement.

Relations Act § 301); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101-05, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962). Congress also intended that arbitration would be central to the resolution of disputes arising under collective bargaining agreements. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-81, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).

Given the primacy of the federal scheme for handling labor disputes, we believe that Congress would not want state officials erring on the side of adjudicating state law disputes whenever it is a close call as to whether a claim is preempted. If anything, Congress would presumably want state officials to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a collective bargaining agreement containing an arbitration clause.

In essence, we think Livadas is claiming that the Commissioner wrongly decided that she was not eligible for enforcement. Because she does not challenge the criterion he used for determining her eligibility (that her claim not be preempted), her claim boils down to a claim that he interpreted his own rule incorrectly. We believe this claim would only establish an error under California law (that she was in fact entitled to enforcement) and not a deprivation of her federal right. We see no way in which an erroneous determination of eligibility for the Commissioner's enforcement under California law can be transformed into a deprivation of a federal right. Therefore, we conclude that Livadas has failed to show that the Commissioner deprived her of her right to bargain collectively under the NLRA, and the district court improperly granted summary judgment in her favor.[2]

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[2] We recently held in *Barnes v. Stone Container Corp.*, 942 F.2d 689 (9th Cir. 1991), that imposition of a just cause term by the Montana Wrongful Discharge Act, which excepted employees covered by a collective bargaining agreement, on parties who were in the process of negotiating a new collective bargaining agreement, interferes with the collective bargaining process and is therefore preempted by the NLRA under *International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). Unlike this case, *Barnes* was a private action between employee and employer where the issue was whether the employee could permissibly pursue a state law claim without running afoul of *Machinists* preemption even though he was not then covered by a collective bargaining agreement. Here, there is no dispute that Livadas is covered by a collective bargaining agreement with an arbitration clause that is normally subject to federal preemption. Nor is there any contention that California Labor Code § 229 incorrectly incorporates preemption principles or is inapplicable to the Commissioner's decision whether to prosecute Livadas's claim against Safeway. Accordingly, Livadas's case is not *Golden State*, where the city's condition itself was impermissible, *Barnes*, where the state's preemption provision was inapplicable, or *Rum Creek Coal Sales v. Caperton*, 971 F.2d 1148, 1152-54 (4th Cir. 1992), where the state's excepting labor disputes from its trespass law cut too broad a preemption path.

REVERSED and REMANDED, with instructions to enter judgment in favor of the defendant-appellant, Lloyd Aubry.

KOZINSKI, Circuit Judge, dissenting:

According to my colleagues, the question presented to us is whether Karen Livadas was entitled to a correct interpretation of state law. See Majority at 2000 [App. 12a]. The answer to this question is clearly no. The answer is much different, however, if one asks the right question: May Karen Livadas be denied state-law benefits just because she is covered by a collective bargaining agreement? It is our responsibility to answer the question fairly presented to us by the litigants, not one we might prefer they had asked. Because the majority comes up with the right answer to the wrong question, I must dissent.

I

A. What happened here is fairly simple: Karen Livadas lost her job at Safeway and the employer did not send her her final paycheck until three days later. This is not a big deal, but under California law an employee is entitled to her paycheck on the date of departure; the law provides a penalty for any delay. Cal. Labor Code §§ 201 & 203. To ensure that impecunious employees are not denied their statutory rights, the state Labor Commissioner—the defendant here—is charged with enforcing such claims on behalf of employees who have valid claims and who are financially unable to employ an attorney. *Id.* § 98.3(a).

The Commissioner does have a good bit of discretion whether to press a particular employee's claim. For example, it is the Commissioner who must determine under what circumstances an employee is deemed financially unable to employ counsel. The Commissioner must also resolve an important question of state law: Does the employee have a valid claim? Had the Commissioner refused to enforce Livadas's claim for either of these reasons, this would have been purely a matter of state law and not the proper subject of a federal action.

But the Commissioner did not refuse to press Livadas's claim on either of these grounds. Instead, he refused to litigate on her behalf because she is covered by a collective bargaining agreement. In so doing, the Commissioner treated employees who are covered by a CBA in a different—and less favorable—manner than all other employees. This is clearly discrimination based on an exercise of protected federal rights. Whether such discrimination is permissible is a question of federal, not state, law.

The majority is distracted by the fact that the Commissioner's policy is based on his interpretation of section 229 of the California Labor Code, which precludes the Commissioner from getting involved in disputes calling for an interpretation of a CBA. The Commissioner construes this section as prohibiting enforcement of Livadas's claim. But surely it doesn't matter *why* the Commissioner engages in invidious discrimination. Were the Commissioner to interpret state law as authorizing the enforcement of section 201 claims only on behalf of whites, would his decision be insulated from federal scrutiny? The point is, the Commissioner is applying state law and his own policy in a way that impinges on protected federal rights. We can't duck the question whether federal law renders such discrimination impermissible.

B. Recognizing perhaps that state law cannot carry the day, the majority seeks refuge in a novel doctrine of quasi-preemption. Assuming, the majority says, that the Commissioner's enforcement of section 201 would not be preempted by federal law,[1] the Commissioner is nevertheless justified in staying his hand by virtue of certain penumbras and emanations radiating from the body of federal labor law: "Given the primacy of the federal scheme for handling labor disputes, we believe that Congress would not want state officials erring on the side of adjudicating state law disputes whenever it is a close call as to whether a claim is preempted. If anything, Congress would presumably want state officials

[1] This is more than a reasonable assumption; it's a fact. See below at II.A.

to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a collective bargaining agreement containing an arbitration clause." Majority at 2002-03. [App. 14a]

This rationale is remarkable for more reasons than one. To begin with, our function is to apply the laws Congress has written, not to guess what Congress "presumably" would have wanted as to matters about which it did not legislate. Further, the theory of quasi-preemption the majority adopts is strikingly similar to the theory of preemption considered and rejected by the Supreme Court and by our court. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 n. 28 (1983) ("we have never intimated that any action merely relating to a contract within the coverage of [LMRA] § 301 arises exclusively under that section"); *Miller v. AT&T Network Systems*, 850 F.2d 543, 546-47 (9th Cir. 1988). To the extent my colleagues are divining some preemptive corona surrounding the federal labor laws, it surely cannot include that which the Supreme Court has said is *not* preempted.

The question of preemption is, of course, significant. To the extent the Commissioner's enforcement of section 201 of the California Labor Code conflicts with federal labor law, the Commissioner is without authority to act. But once we step outside the arena of actual preemption, federal law imposes no obligation on the Commissioner to refrain from acting. And his refusal to act simply because the employee is covered by a CBA raises a serious question of anti-union discrimination. The majority's attempt to find safety between the pendulum of preemption and the pit of unlawful discrimination is simply unavailing.

II

The issue presented to us is really very simple: Is the relief Livadas seeks in fact preempted by the federal labor laws? And if not, is the Commissioner acting unlawfully in refusing to enforce Livadas's claim because she is covered by a CBA?

A. The first question has an easy answer: No. State-law claims are preempted by federal labor law if they are "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985). We have interpreted this language to require federal preemption of state-law causes of action for violating a CBA, founded on rights created by a CBA, or substantially dependent on or governed by the terms of a CBA. See *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 861 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988). On the other hand, there is no incompatibility "between federal rules designed to restore the equality of bargaining power, and state . . . legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754 (1985). In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Supreme Court held that state-law claims are "independent" of the CBA and therefore not preempted where "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* at 407.

In *Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991), we interpreted *Lingle* and held that an employee's claim for assault and battery based on unsafe working conditions was not preempted, even though there were provisions in the CBA that governed the work environment. Because the employee's claim "alleg[ed] violation of a duty owed to all citizens," the state-law claim could be decided without reference to the CBA. *Id.* at 777 (emphasis added); see also *Operating Engineers Pension Trust v. Wilson*, 915 F.2d 535 (9th Cir. 1990) (state-law action for fraud in the inducement not preempted because independent of rights under CBA).

Livadas's claim against Safeway is grounded only in state law: A court could find that the employer did not pay her immediately upon termination—and thus violated the statute—without ever looking at the CBA. The Commissioner's

argument that enforcement of section 201 requires an application of the CBA because he will have to consult the contract to determine Livadas's wage rate is answered by the Supreme Court in *Lingle:* "A collective-bargaining agreement may, of course, contain information *such as rate of pay* and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. . . . In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted." 486 U.S. at 413 n. 12 (emphasis added).

B. The second question is somewhat closer. The Commissioner seems to be badly mistaken about the scope of federal labor law preemption—honestly mistaken, but mistaken nonetheless. That the Commissioner's policy is based on an honest (though flagrant) mistake of law does not save it from invalidity. He is a state official administering a state program in a way that arguably burdens the right of employees to participate in collective bargaining. Where, as here, the policy treats individuals differently based on the exercise of a federally protected right, we must look at the effects of the policy, not merely its purposes.

The effect of the Commissioner's policy is not earthshaking, but neither is it insignificant. It denies employees who are covered by a CBA the right to have their state labor law claims pressed by the state Labor Commissioner free of charge. What this means is that impecunious employees who serve at will, pursuant to individual contracts and those who are covered by implied contracts are all entitled to the services of a state official; the only employees excluded as a class are those who exercise their federal labor rights. As the district court noted, "[t]he parties agree that the defendant provides certain valuable protections and benefits to all California employees except those who work under collective bargaining agreements." *Livadas v. Aubry*, 749 F. Supp. 1526, 1528 (N.D. Cal. 1990). I find it hard to conclude that

denying a valuable benefit to employees simply because they are covered by a CBA does not burden the exercise of rights protected by the NLRA.[2]

I might nevertheless conclude that this burden on the collective bargaining process is permissible if it served some legitimate state purpose, but we know it doesn't. I have difficulty approving even a slight burden on a federally protected right when the *only* justification offered is the Commissioner's mistaken understanding of federal preemption law. Federal preemption is our bailiwick, not the Commissioner's, and if he is confused on this score, it's our job to set him straight. Because he offers not the slightest state-law based justification for his policy, I cannot see my way clear to approving it.

CONCLUSION

While I agree with the majority that Livadas has a right enforceable in federal court, I cannot join my colleagues in gutting that right and improperly deferring to the Commissioner. I therefore respectfully dissent.

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[2] Aside from the effects on individual employees, the Commissioner's policy may have an effect on the collective bargaining process itself. It is not inconceivable that an employer could point to this discrepancy as an argument against an effort to unionize: "Look here, if you vote for the union, the first thing that happens is that the state Labor Commissioner abandons you." In a closely fought election, this type of argument might make a difference.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-90-0468 TEH

KAREN LIVADAS,
PLAINTIFF

v.

LLOYD W. AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER OF CALIFORNIA,
DEFENDANT

[Filed: October 12, 1990]

MEMORANDUM OPINION AND ORDER

THELTON E. HENDERSON, District Judge:

This matter comes before the Court on the plaintiff's motion for summary judgement and the defendant's countermotion for summary judgement. The plaintiff moves for summary judgement on the ground that the defendant's policy, denying enforcement of certain provisions of the California Labor Code to Plaintiff on the basis of her coverage under a collective-bargaining agreement with an arbitration clause, constitutes state action which infringes upon her federal rights under the National Labor Relations Act (NLRA), in violation of 42 U.S.C. § 1983. The plaintiff alleges that the policy denies her certain valuable benefits, which are granted to all employees except those whose employment is governed by a collective bargaining agreement containing an arbitration clause, and that the policy discourages collective bargaining, which is a federal right granted to all employees in the NLRA.

The defendant, in a countermotion for summary judgement, alleges that, rather than interfering with the plaintiff's rights under federal law, the state's policy actually encourages collective bargaining and arbitration, and that furthermore, federal preemption doctrine prevents the defendant from providing the contested benefits to the plaintiff.

The parties' motions for summary judgement came on for hearing on September 24, 1990 at 10:00 a.m., the Honorable Thelton E. Henderson presiding. The plaintiff was represented by Davis, Cowell, & Bowe and Michael T. Anderson. The defendant was represented by H. Thomas Cadell, Jr., Chief Counsel, Division of Labor Standards Enforcement. The Court would like to thank the parties, and especially Mr. Anderson, for their excellent work in briefing the very difficult issues presented in these motions. After careful consideration of the parties' written and oral arguments, it appears to the satisfaction of the Court therefrom that the plaintiff's

motion for summary judgement should be GRANTED and that the defendant's motion for summary judgement should be DENIED.

BACKGROUND

The plaintiff, Karen Livadas, is a member of United Food and Commercial Workers, Local 373, AFL-CIO ("Local 373"). Ms. Livadas worked at Safeway Stores ("Safeway") in Napa County, California until January 2, 1990, when she was notified through her union that she had been terminated from the job. Ms. Livadas alleges that on the day she was terminated she requested all pay due her. The store manager informed Ms. Livadas that Safeway would mail her a check. Safeway did not pay the plaintiff until January 5, 1990. Ms. Livadas alleges that this delay in payment violated California Labor Code § 201, which requires employers to remit unpaid wages to discharged employees immediately upon termination. Labor Code § 203 provides penalties for employer noncompliance with § 201.

On January 3, 1990, Ms. Livadas called the Napa office of the California Division of Labor Standard Enforcement (DLSE) to file a claim regarding the outstanding wages. The plaintiff allegedly spoke to two officers who told her that the DLSE could not process her claim. On January 8, 1990, the plaintiff went in person to the DLSE's Napa office. Once again, the officer on duty refused to process her claim and told Ms. Livadas that she must process her claim through her union, and that if her union refused to handle her wage claim, she should contact the National Labor Relations Board (NLRB).

Karen Livadas filed a complaint against the defendant, Lloyd Aubry, Jr., in his official capacity as Labor Commissioner for the State of California, seeking injunctive and declaratory relief and damages flowing from an alleged agency policy of discrimination in the enforcement of the California Wage and Hour Law against employees who work under collective bargaining agreements which have arbitration

clauses. The parties agree that the defendant provides certain valuable protections and benefits to all California employees except those who work under collective bargaining agreements (CBA's) containing arbitration clauses. The plaintiff alleges that the defendant's policy denied her access to the investigatory, prosecutorial, and remedial resources provided under California Labor Code sections 79 through 104 for the sole reason that she is an employee with a CBA containing an arbitration clause. The plaintiff alleges that DLSE's denial of benefits interferes with her federal rights under the NLRA, and therefore violates 42 U.S.C. § 1983.

Both of the parties agree that the policy of the DLSE is to enforce Labor Code §§ 201 and 203 for all employees except for those whose work is governed by CBA's containing binding arbitration clauses. Ms. Livadas argues that on this basis alone, the Court can resolve her motion for summary judgement in her favor.

The plaintiff alleges that her participation in a labor union and in collective bargaining constitute federally protected rights, and that the defendant's denial to the plaintiff of benefits under California law on the basis of her exercise of her federally created rights violates 42 U.S.C. § 1983. The plaintiff argues that the NLRA establishes a system under which employers and employees are each provided with economic weapons which they may use against each other. One of the rights granted to employees is the right to bargain collectively. The state's denial to employees working under a CBA with an arbitration clause of the valuable benefit at issue upsets the balance of power established by the NLRA. The plaintiff argues than the provision of such a valuable state benefit cannot be conditioned upon the employees relinquishment of the federally created right of collective bargaining.

In his answer, the defendant affirmatively alleges, among other defenses, that the terms of the plaintiff's employment at Safeway were governed by a CBA which contains a mandatory and binding arbitration clause, and that the DLSE properly investigated and dismissed the plaintiff's claim on

the grounds that federal labor law preemption doctrine precludes the Commissioner from interpreting or applying the terms of the CBA to determine damages allegedly due to the plaintiff. The DLSE argues that federal preemption doctrine makes the interpretation of CBA's a matter for the labor arbitrator and the NLRB. Since damages under § 203 are determined in terms of wages, which are established by the CBA, the defendant argues that enforcement of the statute would entail interpretation of the CBA, which is preempted. The defendant claims that the plaintiff should have the dispute resolved through the grievance arbitration scheme established by the CBA. The defendant claims that this policy actually encourages labor arbitration.

The plaintiff claims that the policy discourages collective bargaining and arbitration because it denies to employees working under a CBA containing an arbitration clause the benefit of state enforcement procedures, which are granted to all others employees. A union employee may not vindicate the right at issue in this case through arbitration because the arbitrator is allowed to enforce only those rights which stem from the CBA. Since the right at issue in this case stems from state law, rather than from the CBA, the arbitrator can not enforce it. The result is that union employees are forced to bargain for a valuable benefit which all other employees receive automatically. Also, since the right to payment of wages upon termination and for penalties for non-compliance stems from state law rather than from the CBA, enforcement of the law does not require interpretation of the CBA, and so is not subject to federal preemption doctrine.

PROCEDURAL POSTURE

The precise questions at issue here have previously been before the Court. In its May 15, 1990 Order, this Court cancelled oral argument and denied both parties' motions for summary judgement on the ground that there were genuine disputes as to material facts in the case. In its June 27, 1990

Order, the Court granted the plaintiff's motion for reconsideration of the Court's May 15, 1990 Order on the ground that the defendant's basis for disputing certain facts which the Court held to be at issue in its earlier Order, were not sufficient to create genuine issues for trial under Fed.R.Civ.P. 56(e); were questions of law rather than of fact; or were immaterial to the resolution of the case. In its August 24, 1990 Order, the Court *sua sponte* again rescheduled hearing to allow the parties to address the threshold issue of whether the NLRA creates a private right in this instance actionable by the plaintiff under 42 U.S.C. § 1983.

In its May 2, 1990 Order, the Court denied the defendant's motion under Fed.R.Civ.P. 19 to compel joinder of plaintiff's employer, Safeway Stores, and her union, Local 373 of the United Food and Commercial Workers, as necessary parties.

Legal Standard for Summary Judgement

Summary judgement is appropriate when there is no genuine dispute as to material facts and the moving party is entitled to judgement as a matter of law. *Jung v. FMC Corp.*, 755 F. 2d 708, 710 (9th Cir. 1985); Fed.R.Civ.P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1976). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* To oppose a motion for summary judgement on the ground that there is a genuine issue of material fact in dispute a party, ". . . may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

DISCUSSION

Private Right of Action

The threshold issue is whether the NLRA right at issue in this case is actionable under 42 U.S.C. § 1983. We hold that

it is. In *Golden State Transit Corp. v. City of Los Angeles, (Golden State II)* 110 S. Ct. 444 (1989), the Supreme Court held that the NLRA gives employees and employers a private right, enforceable under 42 U.S.C. § 1983, to engage in free collective bargaining without penalty or restraint by the State.

Golden State Transit Corp. v. City of Los Angeles, (Golden State I) 475 U.S. 608 (1986) and *Golden State II* involved the labor negotiations of the Golden State Transit Corp., a taxicab company. At the time that Golden State's operating franchise license expired, and was subject to a renewal decision by the City of Los Angeles, Golden State was in the midst of a strike by its workers. The City refused to renew Golden State's operating license so long as the company remained in a labor dispute with its workers.

Golden State sued the City for an injunction and damages under § 1983. In *Golden State I*, the Supreme Court held that the City's action penalized Golden State for the exercise of rights granted under the NLRA. The Court held that the NLRA gave employers the right to withstand the demands of striking workers, just as it gave workers the right to strike. The City's action imposed a penalty, or additional burden on the cab company for the exercise of its NLRA right, thereby upsetting the power balance between labor and management established in the NLRA. On remand, the district court enjoined the city to reinstate the franchise, but held that the NLRA did not create a private right of action under § 1983. The Ninth Circuit affirmed.

In *Golden State II*, the Supreme Court expressly held that the NLRA granted the cab company rights enforceable under § 1983. The Court's analysis begins with the language of § 1983 which provides for a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," which, the Court notes, "plainly indicates [that] the remedy encompasses violations of federal statutory as well as constitutional rights." *Golden State II*,

110 S. Ct. at 448. The Court followed with the two-step analysis of *Middlesex County Sewerage Authority v. National Sea Clammers Assn., (Sea Clammers)*, 453 U.S. 1 (1981).

The first step of the *Middlesex* test requires the Court to determine "whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.' " *Golden State II*, 110 S. Ct. at 448 (citations omitted). The Court also must determine whether "the provision in question was 'inten[ded] to benefit' the putative plaintiff." *Id.* (citations omitted). On this issue, the *Golden State II* Court held:

> We agree with petitioner [Golden State Cab Co.] that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives it rights enforceable against governmental interference in an action under § 1983.
>
> *Id.* at 450
>
> The NLRA creates "rights" in labor and management that are protected against governmental interference.
>
> *Id.* at 449.

The second part of the *Sea Clammers* test is that even if there is a federal right, the defendant may show that Congress " 'specifically foreclosed a remedy under § 1983,' by providing a 'comprehensive enforcement mechanism for protection of a federal right.' " *Golden State II*, 110 S. Ct. at 448, (citations omitted). The Court noted that " 'We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." *Id.* at 449, (citations omitted). The *Golden State II* Court held:

> a § 1983 action is [not] precluded by the existence of a comprehensive enforcement scheme. Although the National Labor Relations Board has exclusive jurisdiction

> to prevent and remedy unfair labor practices by employers and unions, it has no authority to address conduct protected by the NLRA against governmental interference. There is thus no comprehensive enforcement scheme for preventing state interference with federally protected labor rights that would foreclose the § 1983 remedy.
>
> *Id.* at 449-50, (citations omitted).

The same analysis must apply in the case of Karen Livadas. The answer to the second question of the *Sea Clammers* test is clear. The § 1983 remedy is not precluded by a comprehensive enforcement scheme, since the National Labor Relations Board does not have the authority to protect NLRA rights against state interference.

The answer to the first question of the *Sea Clammers* test is equally clear, and appears even to be presupposed by the *Golden State II* opinion. Since the NLRA creates rights in employers enforceable against state interference under § 1983, it must equally vest employees with those rights. The *Golden State II* Court held:

> The NLRA, however, creates rights in *labor and management* both against one another and against the State. By its terms, the Act confers certain rights "generally on *employees* and not merely as against the employer." (emphasis added, citations omitted).
>
> *Id.* at 450.
>
> We have held, based on the language, structure, and history of the NLRA, that the Act protects certain rights of *labor and management* against governmental interference. (emphasis added).
>
> *Id.* at 451.
>
> the interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another,' is a right specifically conferred on *employers and employees* by the NLRA.

> *Id.* at 452. (emphasis added).

It is clear that employees, as well as employers, were "the intended beneficiaries of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives [them] rights enforceable against governmental interference in an action under § 1983." *Id.* at 450.

The DLSE relies upon *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) to argue that while the employer unquestionably has a private right of action under § 1983, individual employees do not have a like right, but that instead, only their union representative has the § 1983 right of action. *Emporium Capwell* involved a small group of unionized employees who wished to negotiate a labor agreement with their employer separate from their union. The *Emporium Capwell* Court held that collective bargaining demanded that all unionized employees be represented by their democratically elected union representatives, and that separate representation of certain employees would undermine the union's bargaining power as well as the purposes of the NLRA.

In this case, Karen Livadas' action does not undermine the position of her union, but rather helps to vindicate her right to participate in union activity free from penalty. In *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830-37 (1984), the Supreme Court decided that the NLRA creates rights enforceable by individual employees, as well as their unions. In *City Disposal* a truck driver refused to drive his vehicle, because he alleged that it had faulty brakes, and that under his CBA he was not obliged to operate unsafe equipment. The driver was discharged and he brought an action challenging the discharge.

The Supreme Court allowed the action by the individual employee, on the ground that the action itself implicated the collective activity of all the workers. The Court noted that it

would not "make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer." *Id.* at 832. The Court continued:

> When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to insure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks.
>
> *Id.* at 832.

Similarly, Livadas' action implicates the rights of all of her fellow workers. *City Disposal* affirms the right of an individual employee to defend what she and her co-workers have won through concerted union activity.

Indeed, the plain language of the NLRA shows its intent to bestow rights on individual employees. The Act explicitly designates "employees" as the recipients of NLRA rights. Section seven of the NLRA is entitled "Rights of Employees." 29 U.S.C. § 157.

Therefore, it is clear that Karen Livadas has a private right of action under § 1983 to bring this case as an individual to vindicate her NLRA rights from interference by the state.

Does the State Action at Issue Infringe Upon the NLRA Right?

The NLRA was designed in large part to establish rights in employees and employers to engage in certain activities which had previously been of questionable legality. The NLRA armed both employer and employee with certain economic weapons, such as the employees' strike and the

employers' lock-out, in an effort to create a balance of power between the two, with the goal of promoting the peaceful settlement of disputes between the parties. Through the NLRA, Congress hoped to move from a history of often violent labor-management relations to a period of "industrial peace."

> Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.
>
> *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

As well as granting employees and employers rights against each other, the NLRA also granted them rights against the state. *Golden State II*, 110 S.Ct. at 450. Prior to the enactment of the NLRA, it was quite common for state courts to enjoin collective activities of workers, especially strikes. See, e.g., *Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896); *United Shoe Machinery Corp. v. Fitzgerald*, 237 Mass. 537, 130 N.E. 86 (1921).

After the enactment of the NLRA, such state court labor injunctions were held to violate the delicate balance of power established by the NLRA by placing the power of the state on the side of the employer. In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court held that a state court could not enjoin a union picket because the injunction "create[d] potential frustration of national purposes." *Id.* The state was not allowed to place its power behind one party in a labor dispute, since that interfered with the scheme established by the NLRA. The *Garmon* Court held that the state court injunction was preempted by federal labor law.

In the case of Karen Livadas, the state action does not take the traditional form of positive sanctions, such as the labor injunction of *Garmon*. Rather, the state has denied a privilege to certain employees who have exercised their NLRA right to collectively bargain. Here the state grants a privilege to all workers, except those who work under a CBA with an arbitration clause. The analysis must be in two parts: (1) Does the NLRA create a right to work under a CBA with an arbitration clause; (2) does the DLSE action infringe upon this right?

1. *The NLRA Creates a Right to Work Under a CBA with an Arbitration Clause.*

The first question is quite straight forward. The right to collectively bargain is the very essence of the NLRA, and the Supreme Court has repeatedly held that arbitration is "part and parcel of the collective bargaining process itself." *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

Section 7, which is the heart of the NLRA, 29 U.S.C. § 157, states:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, *to bargain collectively* through representatives of their own choosing . . .
>
> (emphasis added).

"The principal purpose of the [National Labor Relations] Act was and is to protect workers who want to organize for collective bargaining." *American Hospital Association v. National Labor Relations Board*, 899 F. 2d 651 (7th Cir. 1990).

As noted above, the right of grievance arbitration is inseparable from the right of collective bargaining itself. The Court has noted that without arbitration, there is no way to resolve contract disputes short of a strike or federal lawsuit. Arbitration is the *quid pro quo* for which unions exchange their right to strike during the term of the CBA. *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235, 247-8 (1970). Fully 96% of CBA's provide for arbitration. *Characteristics of Major Collective Bargaining Agreements* (U.S. Dept. of Labor Bull. 2013, 1979), 82.

The Supreme Court held in *Warrior and Gulf*, 363 U.S. 574, 581, 80 S.Ct. 1347, 4 L. Ed. 2d 1409, that labor arbitration is "at the very heart" of the collective bargaining process; it "is actually a vehicle by which meaning and content are given to the collective bargaining agreement." "The grievance procedure is, in other words, a part of the continuous collective bargaining process."

Therefore, there can be no question that just as the NLRA creates a right in employers to withstand labor strikes, *Golden State I*, *supra*, the Act equally creates a right in workers to negotiate and to work under CBA's, and that this right entails the right to incorporate an arbitration clause in the CBA. It is this right upon which Karen Livadas contends the DLSE's action infringes.

The DLSE contends that its policy does not actually discriminate against union members, because it is possible for union members to work under a CBA which does not have an arbitration clause, or to work without any CBA at all. These union workers would be entitled to the payment enforcement benefits which Livadas seeks. Also, DLSE continues, it is possible for non-union employees to work under a CBA which has an arbitration clause.

DLSE misses the point. This is *not* an equal protection case alleging discrimination against union members. Rather, it is a case alleging state interference with the exercise of the federal right to work under a CBA which has an arbitration clause. The NLRA grants the right to collectively bargain to all employees, union and non-union. The remaining question is whether the State's refusal to enforce the wage payment statute on the behalf of workers who work under CBA's with arbitration clauses infringes upon that right.

2. *The DLSE's Action Infringes Upon the Right to Work Under a Collective Bargaining Agreement Containing an Arbitration Clause.*

In the case of Karen Livadas, the state does not positively enjoin Livadas from exercising her NLRA right to collectively bargain, rather, it denies her a benefit because she exercised that right. In the cases noted above, (*Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896); *United Shoe Machinery Corp. v. Fitzgerald*, 237 Mass. 537, 130 N.E. 86 (1921); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)), the state enjoined union activity which was protected under the NLRA, specifically striking or picketing. In the instant case, the state denies a benefit to workers who exercise their NLRA right to work under CBA's with arbitration clauses.

The defendant enforces §§ 201 and 203 of the California Labor Code for all workers except those who work under CBA's with arbitration clauses. Section 201 provides that discharged employees must be paid all wages due upon termination. Section 203 provides for penalties for employer non-compliance with § 201. There is no question that state enforcement of the statute constitutes a valuable benefit. The defendant refuses to extend this benefit to workers such as Karen Livadas.

There would be no question that the state could not directly sanction Karen Livadas for working under a CBA, because that would constitute an interference with her federal rights. The defendant's policy similarly interferes with Livadas' federal NLRA right to collectively bargain.

The Supreme Court has made clear that the state may not condition the receipt of a valuable benefit upon the relinquishment of a federal right. The Ninth Circuit stated in *Bullfrog Films, Inc. v. Wick*, 847 F. 2d 502, 511 (9th Cir. 1988):

> government may not condition the conferral of a benefit on the relinquishment of a constitutional right: "For at least a quarter-century, this Court has made clear that

> even though a person has no 'right' to a valuable governmental benefit . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."
>
> Citing, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).[1]

Recent Supreme Court precedent in the labor law area supports this premise. In *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986), the State of Wisconsin denied to repeat violators of the NLRA eligibility for state procurement contracts. Clearly, such contracts were merely a privilege, rather than a right, but the Supreme Court held that the privilege could not be conditioned upon the relinquishment of NLRA rights. In *Gould* the state had used its power on the side of labor, thereby upsetting the balance of power established by the NLRA. (The state's action was therefore held to be preempted by federal labor law. *See*, section on NLRA preemption doctrine, *infra*).

Golden State I is in accord. In *Golden State I* the City of Los Angeles refused to renew the Golden State Taxi Company's franchise permit unless it resolved a strike with its workers. The Supreme Court held that Golden State had a right under the NLRA to withstand the strike. Even though the franchise permit was a privilege, the Court held that the City could not condition the receipt of the privilege on the company's relinquishment of its NLRA right to withstand the strike. The Court held that "the settlement condition imposed by the Los Angeles City Council . . . destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons." 475 U.S. at 619. "Federal law intended to leave the employer and the union free to use their economic weapons against one another." *Id.* at 618, (citations omitted).

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[1] For example, the state could not grant every citizen a tax rebate, except for those who engage in collective bargaining, even though the action would be the denial of a benefit or privilege rather than a direct sanction.

It is clear that employees possess the NLRA right to use economic weapons free from state interference just as much as employers enjoy that right. *Id.* at 618. In the case of Karen Livadas, the state has denied her the privilege of enforcement of California Labor Code §§ 201 and 203 solely on the basis that she works under a collective bargaining agreement having an arbitration clause. The denial of this privilege, like the denial of the privilege of a taxi franchise license, interferes with the exercise of NLRA rights. The only way for employees to receive the privilege is for them to relinquish their NLRA right to collectively bargain. As in *Golden State I*, the state is disallowed from upsetting the "balance of power" established by the NLRA, by allocating privileges in such a way that encourages either labor or management to relinquish its NLRA rights. The DLSE's policy in this case infringes upon Karen Livadas' NLRA right to work under a CBA with an arbitration clause, just as the City of Los Angeles' policy in *Golden State I and II* infringed upon the cab company's NLRA right to withstand a strike.

As discussed earlier, the NLRA right at issue is actionable under § 1983. The DLSE policy therefore constitutes action under color of state law which infringes upon Karen Livadas' NLRA rights in violation of § 1983. *Golden State II*.

Preemption

The DLSE contends that it is preempted from enforcing §§ 201 and 203 on behalf of employees who work under CBA's having arbitration clauses. The DLSE rests its contention on two grounds: (1) section 229 of the California Labor statute; (2) federal labor law preemption doctrine under § 301 of the Labor Management Relations Act (LMRA).

1. ***Preemption Under the California Labor Statute.***

The DLSE bases its refusal to prosecute Karen Livadas' late wage payment claim at least in part on California Labor Code § 229, which states:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

DLSE relies on the decision of the California Court of Appeals in *Plumbing, Heating and Piping Employers Council of Northern California v. Howard, (Howard)*, 53 Cal.App.3d 828 (1975), which held § 229 to "preclude the Labor Commissioner from hearing and enforcing a claim for collection of alleged due and unpaid wages by an employee who belongs to a union which has entered into a collective bargaining agreement which contains an arbitration clause." *Id.* 53 Cal.App.3d at 832-3.

The short answer is that preemption doctrine is a matter of federal, not state law. A primary purpose of preemption doctrine was to maintain a uniform federal labor law doctrine and to protect federal NLRA rights. Insofar as § 229 and the State's interpretation of it in *Howard* goes beyond the limits of federal preemption doctrine, it is invalid. The DLSE must provide the benefit of enforcement of the wage payment statute to all employees equally unless the federal preemption doctrine *requires* the State to deny enforcement of the wage payment provision to union members working under a CBA. As we shall see below, preemption is not required under federal preemption doctrine.

2. ***Federal Preemption Doctrine.***

There are three major strands of federal labor law preemption doctrine, one based upon § 301 of the Labor Management Relations Act (LMRA) and two based upon §§ 7 and

8 of the NLRA. It is the § 301 doctrine which is the source of greatest contention in this case, but NLRA §§ 7 and 8 preemption issues arise as well.

a. *LMRA Section 301 Preemption*

Section 301 preemption doctrine was established in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and was developed significantly in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). The *Lucas Flour* Court held that § 301 reflected an intention to have a single federal law of CBA interpretation. For this reason, CBA interpretation was held to be a matter for the labor arbitrator, the National Labor Relations Board, and the federal court. The parties to a CBA are not allowed to bypass the arbitration process by filing a claim, such as one for breach of the CBA, in state court. For the employee to do so was also seen as undermining the central role of the labor arbitrator as the primary interpreter of the CBA.

Allis-Chalmers v. Lueck, 471 U.S. 202, 212 (1985) held that the state court is preempted from hearing cases, even if based in part on state law, if the state claim is "inextricably intertwined with consideration of the terms of the labor contract." Such cases must be heard by the labor arbitrator. *Id.* at 213. In *Allis-Chalmers*, the employee instituted a state tort action against his employer in state court. However, the duty establishing the tort ultimately derived from "the rights and obligations established by the contract." *Id.* at 217. The Supreme Court therefore held that the state court was preempted from hearing the tort action "[b]ecause the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 218.[2] The Court also noted that an identical claim could

[2] Both parties bring to the attention of the Court, *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990). *Stikes* involved a suit brought by the employee, Stikes, who claimed that the employer's search of Stikes' automobile violated his California State Constitutional right to privacy. The Ninth Circuit held that the suit was preempted under LMRA § 301 since the privacy right turned on the employee's reasonable expectation of privacy, which in turn depended in part on interpretation of the CBA. Interpretation of the CBA was especially important since it contained a provision whereby the union agreed to encourage its employees to participate in the employer's safety program, which included random searches. The State law claim was therefore found to be "inextricably intertwined with the collective bargaining agreement." *Id.*, 914 F.2d at 1269.

For the reasons below, we find that Karen Livadas' state law claim is not similarly intertwined with interpretation of her CBA. While an employee's reasonable expectations of privacy are rooted at least in part in the CBA, the claim for timely payment of final wages is based solely upon state law and not upon the CBA.

have been brought before the arbitrator based upon CBA provisions.

The defendant argues that we should follow *Allis-Chalmers* in the instant case, and require Ms. Livadas to bring her claim before the labor arbitrator. The defendant argues that enforcement of the state provision at issue for employees working under a CBA would be "inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. The defendant reads *Allis-Chalmers* too broadly, as is clear from subsequent cases.

In the case of Karen Livadas, the right she seeks to have vindicated does not derive from her contract, but rather, from state law. State law requires the employer to make full payment of wages due to a discharged employee upon termination. Failure to comply with this provision results in penalties. The simple question of whether the statute was violated can be determined wholly independently from the CBA. Karen Livadas was not paid until three days after her termination. It requires reference only to a calendar, not to the CBA, to determine that the statute was violated and penalties are due.

Also, unlike the employee in *Allis-Chalmers*, Livadas could not have brought this claim to the arbitrator. The arbitrator may base her decisions solely upon the terms of the CBA, and not upon public law. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 53-54 (1974). Since the CBA contains no term requiring wage payment immediately upon termination, and imposes no penalty for failure to make such timely payment, there would be no arbitrable issue.

Later cases are in accord with this reading. In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), a unanimous Supreme Court held that a union employee was not preempted from bringing a state tort claim alleging that the employer had retaliatorily discharged the employee who had filed a worker's compensation claim. The claim was not preempted even though the employee could and did file a concurrent claim with the labor arbitrator under a CBA provision prohibiting discharge without just cause, and even though both claims were based on the same set of events.

The Court held that the state law action was not preempted because it involved a "purely factual inquiry [which did] not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 preemption purposes . . ." *Id.* at 407.

In *Operating Engineers v. Wilson*, 915 F. 2d 535 (9th Cir. 1990) the Ninth Circuit held that a state law claim for fraud in the inducement of a collective bargaining agreement was not preempted by § 301. In *Operating Engineers* an employer claimed that a union agent had fraudulently induced him to sign a collective bargaining agreement. The Court, relying on the reasoning of *Lingle*, held that the "state tort claim for fraud in the inducement [of the collective bargaining agreement] is not preempted by section 301 because it does not require reference to the collective bargaining agreement." *Id.*, 915 F.2d at 539.

Our case is quite similar. The state law question can be resolved based on a "purely factual inquiry," *Lingle*, 108 S. Ct. at 1882, of whether the wage payment was made at the time of termination. There is no question that it was not. There is no need to refer to the terms of the CBA to resolve this question.

The defendant argues that penalties under the state statute are based upon wages. The statute provides that the employee is entitled to continue to receive wages until the employer remits the last wage payment. The defendant argues that determination of penalties would therefore require interpretation of the CBA, which is preempted, and should be a matter for the labor arbitrator.

Lingle resolves this issue by holding that "tangential" issues, such as damages in a state law action, may be determined without preemption:

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise pre-empted, would stand . . . the separate state law analysis would not be thereby pre-empted.
>
> *Lingle*, 486 U.S. at 413, n. 12.

The *Lingle* court noted that Title VII cases involving union members are not preempted as a matter of federal law, even though damages are based upon backpay, which requires determination of the wage rate set by the CBA. 108 S. Ct. at 1885. Such an issue is "tangential" to the underlying anti-discrimination claim.

The *Allis-Chalmers* Court stated similarly, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement is pre-empted by § 301." 471 U.S. 202, 211. See also, *Caterpillar Inc. v. Williams*, 482 U.S. 386

(1987) (state law action for breach of individual employment contract is not preempted by federal labor law). The issue of penalties is a "tangential" issue, as described in *Lingle*, and so does not require the preemption of the underlying state claim, which can be resolved independently of the CBA.

The defendant argues further that the very issue of arbitrability is an arbitrable issue under the terms of the CBA. They argue that the CBA states that the arbitrator is to decide whether any given dispute is arbitrable. Therefore, the DLSE claims that the threshold determination requires interpretation of the CBA, and the matter is therefore pre-empted.

The defendant's argument is without merit. It would pre-empt every possible dispute, (including Title VII claims), raised by a union employee since the arbitrator would first have to determine whether the issue was covered by the CBA. Where an employee's claim is based upon state law rather than upon the labor contract, federal law does not require arbitration because there is nothing to arbitrate. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981).

Also, as *Lingle* shows, even if a matter is arbitrable, a concurrent state claim will not be preempted if that claim can be resolved independently of the CBA. In *Lingle* the employee brought both a state claim in state court and a CBA claim before the arbitrator, and there was no preemption.

> [I]f dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.
>
> *Lingle*, 486 U.S. at 409-10.

The critical issue for § 301 preemption is whether the state claim can be resolved independently from the CBA (except

for "tangential" issues). As discussed above, Karen Livadas' claim is not preempted based upon this test.

b. *NLRA §§ 7 and 8 Preemption*

There are two varieties of federal labor law preemption arising from §§ 7 and 8 of the NLRA.[3] *Garmon* preemption, based upon *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959); and *Machinists* preemption, based upon *Lodge 76, International Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n* 427 U.S. 132 (1976). *Garmon* preemption prohibits the state from interfering with activity expressly permitted by the NLRA. (In *Garmon* the state had enjoined a union picket). *Machinists* preemption prevents the state from interfering with activity which the NLRA intended to leave unregulated. (In *Machinists* the state had penalized workers who refused to work overtime. The *Machinists* court held the action to be preempted even though the NLRA does not expressly allow such worker activity.)

The plaintiff argues that enforcement of Labor Code §§ 201 and 203 on behalf of employees working under CBA's having arbitration clauses would not be preempted by NLRA §§ 7 and 8 preemption doctrine, because the Labor Code provisions constitute a state minimum labor standard. The plaintiff further argues that the DLSE's refusal to enforce the Labor Code provisions for employees such as Karen Livadas is preempted by the NLRA since the discriminatory enforcement upsets the balance of power between labor and management established by the NLRA.

In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), a unanimous Supreme Court held that "in any pre-emption analysis, '[t]he purpose of Congress is the ultimate touchstone.' " *Id.* at 747 (citations omitted), and "courts

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[3] NLRA §§ 7 and 8 preemption was addressed tangentially above, in the section entitled, "DOES THE STATE ACTION AT ISSUE INFRINGE UPON THE NLRA RIGHT?"

sustain a local regulation unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Id.* at 747-48.

The *Metropolitan Life* Court held that the purposes of the NLRA were to establish an "equality of bargaining power between employees . . . and employers . . ." and to address the "problem of depressed wage rates." *Id.* at 753-54. Therefore, state regulations which "alter the economic balance between labor and management [established by the NLRA]" would be preempted. *Id.* at 750, citing, *New York Telephone Co. v. New York Labor Dept.*, 440 U.S. 519, 532.

In *Metropolitan Life*, the Supreme Court found *not* preempted a state law which required all employers, union and non-union, to provide a certain level of mental health insurance to all insured employees. The Court held that the law was not preempted, even though many CBA's already had terms governing mental health. The court reasoned that "minimum labor standards" of "general applicability" are not preempted because they "affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Id.* at 755. Since such benefits affect all workers equally, they neither encourage nor discourage workers from joining labor unions, and therefore do not upset the balance established by the NLRA.

The Court, noting the purpose of the NLRA to improve the status of workers stated:

> It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.
>
> *Metropolitan Life*, 471 U.S. at 756.

By the Supreme Court's analysis, the DLSE seeks to turn the Wagner Act on its head by providing the benefit of the enforcement of the timely final wage payment provisions only to non-union employees and not to the union employees who were the intended beneficiaries of the NLRA.

Also, DLSE's discriminatory enforcement of the Labor Code provisions upsets the balance of power between labor and management established by the NLRA. It arms employers with an additional weapon to use against unionization, since they will be able to warn employees that if they decide to collectively bargain, they will lose their state right to timely wage payment enforcement. California Labor Code §§ 201 and 203 establish timely payment of final wages as a minimum term of employment for all workers, just as the statute in *Metropolitan Life* established mental health care as a minimum term of employment in Massachusetts. The state may not deny enforcement of that benefit only to workers who are parties to a CBA with an arbitration clause. *A fortiori*, the State is clearly not preempted from providing this benefit to employees who work under CBA's.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) is quite similar to the case at bar. *Fort Halifax* addressed a Maine statute which required employers with more than 100 employees to pay their workers substantial severance pay if they closed or moved their factories. The employer argued that the state was preempted from enforcing the statute on behalf of union employees. The Court held that since the statute applied equally to all workers, it did not upset the balance established by the NLRA, but rather established "rights under state law [which formed] a 'backdrop' for their negotiations." *Id.* at 21, (citations omitted).[4]

From *Fort Halifax* and *Metropolitan Life*, it should be abundantly clear that the state is free to enforce minimum

[4] In *Fort Halifax*, as in our case, the amount of severance pay due under the state statute was determined based upon the employees' wage rate at the time that the plant closed, which would, of course, be based upon the CBA. Still, the Court held that the Maine statute was not preempted.

standards regarding wages and conditions of employment on behalf of all employees in the state. The statute at issue in the instant case establishes as a minimum condition of employment in the state of California, that if an employee is fired, the employer must pay all wages due at the time of termination. It is also clear from these cases that if California is to establish such a minimum standard of employment, it must do so for all employees, not only those who do not engage in collective bargaining.

In *Golden State I*, *supra*, the City of Los Angeles was preempted by federal labor law, from conditioning the benefit of a taxi franchise license upon the resolution of a strike. The Court held that the NLRA conferred a right upon the employer to withstand the strike, and refuse to negotiate. The City's refusal to grant the employer a franchise license until resolving the strike interfered with the employers NLRA right, and so was preempted by federal labor law. The Court applied preemption analysis and determined that the state's action upset the balance of power established by the NLRA, by "favoring the union." 475 U.S. at 619. "States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts." *Id.* at 614-15. In other words, the City could not grant licenses only to taxicab companies who did not exercise their NLRA rights to withstand strikes.

In the instant case, the state's action interferes with Karen Livadas' NLRA right to collectively bargain. It denies her the benefit of enforcement of §§ 201 and 203 of the California Labor Code solely because she works under a CBA with an arbitration clause. As in *Golden State I*, Livadas is penalized for engaging in an NLRA-protected activity (collective bargaining), and therefore, as in *Golden State I*, the state has "destroyed the balance of power designed by Congress," *Id.* at 619, and the discriminatory policy is preempted.

For the foregoing reasons, and after careful consideration of motions, legal memoranda, exhibits, and arguments of the parties, and consistent with the accompanying Memorandum Opinion, IT IS HEREBY ORDERED that:

1. The plaintiff's motion for summary judgement is GRANTED;

2. The defendant's countermotion for summary judgement is DENIED;

3. The defendant, Lloyd Aubry, and his successors as Labor Commissioner for the State of California, are hereby enjoined to enforce sections 201 and 203 of the California Labor Code without discrimination based upon a given claimant's coverage under a collective-bargaining agreement having an arbitration clause;

4. The defendant, Lloyd Aubry and his successors as Labor Commissioner for the State of California, are hereby ordered to institute an action in the California State Courts pursuant to California Labor Code section 203 to recover any and all penalties due to the plaintiff, Karen Livadas, by her employer, Safeway Stores, on account of her employer's willful failure to pay her wages due at the time of discharge;

5. The defendant, Lloyd Aubry and his successors as Labor Commissioner for the State of California, are hereby declared to have violated the rights of the plaintiff, Karen Livadas, under the National Labor Relations Act, by refusing to afford her certain protections and benefits of the California Wage and Hour Law, (specifically, the enforcement of Labor Code sections 201 and 203), solely on the basis of the fact that her employment was governed by a collective bargaining agreement having an arbitration clause;

6. The defendant, Lloyd Aubry and his successors as Labor Commissioner for the State of California, are hereby ordered to pay as compensatory damages to the plaintiff, Karen Livadas, the full value of her wage claim in the event that the claim is held time-barred by the California State Courts;

7. The defendant, Lloyd Aubry and his successors as Labor Commissioner for the State of California, are hereby ordered to pay the plaintiff, Karen Livadas, a reasonable attorney fee and costs of suit herein.

IT IS SO ORDERED.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN LIVADAS,
PLAINTIFF-APPELLEE,

v.

LLOYD AUBRY, IN HIS OFFICIAL CAPACITY AS LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
DEFENDANT-APPELLANT.

No. 90-16650
D.C. No.
CV-90-0468-TEH

ORDER

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THELTON E. HENDERSON, District Judge, Presiding

Argued and Submitted
May 13, 1991—San Francisco, California

Filed September 11, 1991
Amended March 8, 1993

Before: Arthur L. Alarcon, Alex Kozinski and
Pamela Ann Rymer, Circuit Judges

ORDER

The opinion filed September 11, 1991, is amended as follows:

Slip opinion, page 12606 (943 F.2d 1140), add a footnote 2 at the end of the second line, which ends with ". . . granted summary judgment in her favor."

> [2] We recently held in *Barnes v. Stone Container Corp.*, 942 F.2d 689 (9th Cir. 1991), that imposition of a just cause term by the Montana Wrongful Discharge Act, which excepted employees covered by a collective bargaining agreement, on parties who were in the process of negotiating a new collective bargaining agreement, interferes with the collective bargaining process and is therefore preempted by the NLRA under *International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). Unlike this case, Barnes was a private action between employee and employer where the issue was whether the employee could permissibly pursue a state law claim without running afoul of *Machinists* preemption even though he was not then covered by a collective bargaining agreement. Here, there is no dispute that Livadas is covered by a collective bargaining agreement with an arbitration clause that is normally subject to federal preemption. Nor is there any contention that California Labor Code § 229 incorrectly incorporates preemption principles or is inapplicable to the Commissioner's decision whether to prosecute Livadas's claim against Safeway. Accordingly, Livadas's case is not like *Golden State*, where the city's condition itself was impermissible, *Barnes*, where the state's preemption provision was inapplicable, or *Rum Creek Coal Sales v. Caperton*, 971 F.2d 1148, 1152-54 (4th Cir. 1992), where the state's excepting labor disputes from its trespass law cut too broad a preemption path.

Judge Kozinski, as dissenter, neither joins in nor opposes the amendment to the majority opinion contained in this order.

With the above amendment, the majority of the panel has voted to deny the petition for rehearing. Judge Rymer has voted to reject the suggestion for rehearing en banc and Judge Alarcon so recommends. Judge Kozinski has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.